

10-26-2011

## State v. Scraggins Respondent's Brief Dckt. 38212

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**IN THE SUPREME COURT OF THE STATE OF IDAHO**

**COPY**

STATE OF IDAHO,	)	
	)	
Plaintiff-Respondent,	)	NO. 38212, 38213
	)	
vs.	)	
	)	
ABRAHAM SCRAGGINS, JR.,	)	
	)	
Defendant-Appellant.	)	

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**BRIEF OF RESPONDENT**

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**APPEAL FROM THE DISTRICT COURT OF THE FOURTH JUDICIAL  
DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE  
COUNTY OF ADA**

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**HONORABLE MICHAEL E. WETHERELL  
District Judge**

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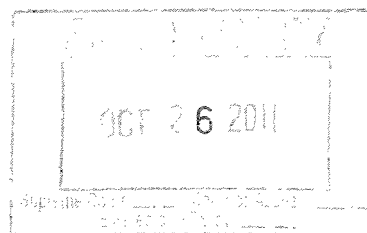
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## STATEMENT OF THE CASE

### Nature Of The Case

Abraham Scraggins, Jr., appeals from the district court's orders revoking his probation, claiming the district court violated his due process rights by revoking probation for violations "previously punished through the intermediate sanction of discretionary jail time."

### Statement Of Facts And Course Of The Proceedings

The state charged Scraggins with, and he pled guilty to, failing to register as a sex offender in Ada County Case No. CR-FE-2009-7354. (R., pp.21-22, 27-28.) The court imposed a unified ten-year sentence with five years fixed, but suspended the sentence and placed Scraggins on probation for ten years, imposing a number of conditions of probation and authorizing "180 days discretionary jail time, to be served at PO's request without prior approval." (R., pp.31-37.) Approximately one year later, the state filed a motion for probation violation alleging Scraggins violated his probation by consuming alcohol and failing stay at his registered address for a nine-day period. (R., pp.45-47.)

One month after the state moved to revoke Scraggins' probation in Case No. CR-FE-2009-7354, the state charged Scraggins in Case No. CR-FE-2009-20101 with two counts of failing to register as a sex offender. (R., pp.101-102.) Pursuant to a plea agreement, Scraggins pled guilty to one count of failing to register as a sex offender as alleged in Case No. CR-FE-2009-20101 and to the allegation that he violated his probation in Case No. CR-FE-2009-7354 by failing to stay at his registered address. (R., p.115.)

The court revoked Scraggins' probation in Case No. CR-FE-2009-7354, ordered his sentence executed and retained jurisdiction. (R., pp.59-60.) The court simultaneously imposed a unified ten-year sentence with five and one-half years fixed in Case No. CR-FE-2009-20101 and retained jurisdiction in that case as well. (R., pp.119-121.) At the end of the retained jurisdiction review period, the court placed Scraggins on probation in both cases subject to several conditions and again authorized 180 days of discretionary jail time. (R., pp.65-70, 125-131.)

Less than two months later, the state filed a motion for probation violation in both cases alleging Scraggins violated his probation by possessing a weapon, failing to abide by the curfew imposed by his probation officer, consuming and/or possessing alcohol, having contact with D.H.<sup>1</sup> contrary to his probation officer's orders, and failing to pay court-ordered fines, fees, and/or costs. (R., pp.78-80, 139-141.) The state also alleged Scraggins violated his probation in Case No. CR-FE-2009-7354 by failing to reimburse the county for his public defender services. (R., p.79.) Prior to filing the motions to revoke, Scraggins served ten days of discretionary jail time for the same conduct that formed the basis of the alleged probation violations. As explained by the prosecutor:

. . . Probation Officers Lakey (phonetic) and Colson arrested Scraggins on 7/7 after finding him in violation of curfew, inebriated and with admissions of violating the no contact order with [D.H.]. Mr. Scraggins['] probation officer Lori Peno was out of town or on vacation or something of that nature. She was out of town at the time anyway. That he was arrested [sic]. So these other probation officers Lakey and Colson put him in jail on discretionary time.

---

<sup>1</sup> D.H. was the victim in the case which resulted in Scraggins' obligation to register as a sex offender. (Indictment filed February 25, 1993, attached to PSI.)

It appears based on the computer system that he was in jail from July 7th from [sic] to July 17th at which time he was released. He was instructed to make an office visit with Officer Peno on the 19th and did meet with her out of custody. At which time he gave a little bit more information to her about -- or more in depth information about his contact with [D.H.].

Following that it was determined by Officer Peno that his violations in fact warranted a probation violation and not just leaving it at the discretionary jail time. So notwithstanding him having done discretionary jail time, he was arrested on an agent's warrant at that time.

(10/14/2010 Tr., p.69, L.16 – p.70, L.14.)

Scraggins ultimately admitted violating his probation in both cases by failing to abide by curfew, consuming and/or possessing alcohol, and having prohibited contact with D.H.; the state dismissed the remaining allegations. (R., p.146.) At the disposition hearing, Scraggins objected to the court considering revoking his probation, claiming the court was precluded from doing so since he had already served discretionary jail time for the violations. (10/14/2010 Tr., p.72, L.2 – p.73, L.2.) According to Scraggins, revoking his probation under the circumstances would violate his due process rights because it "changes the sentence." (10/14/2010 Tr., p.72, Ls.12-13.) The court rejected Scraggins' argument, revoked his probation in both cases and ordered his sentences executed. (10/14/2010 Tr., p.73, L.3 – p.74, L.20; R., pp.89-91, 150-152.)

Scraggins timely appealed. (R., pp.92-94, 153-155.) Pursuant to Scraggins' motion, both of his cases were consolidated for appeal. (Motion to Consolidate dated December 6, 2010; R., pp.3-4.)

## ISSUE

Scraggins states the issue on appeal as:

Does the due process clause of the Fourteenth Amendment permit a district court to revoke probation for past violations which were previously punished through the intermediate sanction of discretionary jail time?

(Appellant's Brief, p.8.)

The state rephrases the issue on appeal as:

Has Scraggins failed to establish that revocation of probation for the same underlying conduct that served as the basis for discretionary jail time implicates due process, much less violates it?



## ARGUMENT

### Scraggins Has Failed To Establish That Revocation Of Probation For The Same Conduct That Served As The Basis For Discretionary Jail Time Implicates Due Process, Much Less Violates It

#### A. Introduction

Scraggins argues “his right to due process was violated when his probation was revoked based on three probation violations that had already been punished through the intermediate sanction of ten days of discretionary jail time.” (Appellant’s Brief, p.9.) Scraggins’ claim fails. Revocation of probation for conduct that also served as the basis for discretionary jail time does not implicate due process, much less violate it.

#### B. Standard Of Review

“Due process issues are generally questions of law, and this Court exercises free review over questions of law.” Kootenai Medical Center ex rel. Teresa K. v. Idaho Dept. of Health and Welfare, 147 Idaho 872, 216 P.3d 630 (2009) (citations and quotations omitted).

A district court’s decision to revoke probation is reviewed for an abuse of discretion. State v. Sanchez, 149 Idaho 102, 105-106, 233 P.3d 33, 36-37 (2009).

C. Scraggins' Due Process Claim Fails Because Revocation Of Probation For The Same Conduct That Served As The Basis For Discretionary Jail Time Does Not Implicate Due Process, Much Less Violate It

Scraggins argues, as he did below, that the district court could not revoke his probation based upon the same conduct that also served as the basis for discretionary jail time because, Scraggins asserts, to do so violates due process. (Appellant's Brief, pp.9-14.) In support of this argument, Scraggins relies on the United States Supreme Court's opinions in Morrissey v. Brewer, 408 U.S. 471 (1972), and Gagnon v. Scarpelli, 411 U.S. 778 (1973). (Appellant's Brief, pp.9-11.) Neither Morrissey nor Scarpelli, however, support Scraggins' due process claim.

In Morrissey, the Supreme Court held that a parolee facing revocation is entitled to due process in the form of:

(a) written notice of the claimed violations of parole; (b) disclosure to the parolee of evidence against him; (c) opportunity to be heard in person and to present witnesses and documentary evidence; (d) the right to confront and cross-examine adverse witnesses (unless the hearing officer specifically finds good cause for not allowing confrontation); (e) a 'neutral and detached' hearing body such as a traditional parole board, members of which need not be judicial officers or lawyers; and (f) a written statement by the factfinders as to the evidence relied on and reasons for revoking parole.

408 U.S. at 489. One year later, the Court in Scarpelli held that probationers, like parolees, are also entitled to due process prior to revocation. 411 U.S. at 782, 786.

Scraggins recognizes that neither Morrissey nor Scarpelli "explicitly address the issue before the Court in this case," but contends "the principles announced in those cases demand a conclusion that probation cannot,

consistent with the due process guarantee of the Fourteenth Amendment, be revoked based solely on past violations that were previously punished through imposition of discretionary jail time.” (Appellant’s Brief, p.11.) In particular, Scraggins argues:

“[F]undamental fairness” is “the touchstone of due process,” as guaranteed by the Fourteenth Amendment, *Gagnon*, 411 U.S. at 790, and it is fundamentally unfair to punish a probationer for certain probation violations through the imposition of discretionary jail time (for which he receives no credit against the underlying sentence) then, after he has completed that discretionary jail time, punish him a second time by revoking his probation and sending him to the penitentiary to serve more time in incarceration for the very same probation violations.

(Appellant’s Brief, pp.11-12 (alteration and emphasis original).)

While fundamental fairness is the *reason* due process is afforded in probation revocation proceedings, it is not a freestanding claim that allows a defendant to avoid proving a violation of a recognized due process right, which in the probation revocation context would be one of the six rights articulated in Morrissey. Scraggins does not contend that any of these specific due process rights were violated nor could he because he was afforded all of his rights during the course of his probation revocation proceedings.

Although framed as a due process violation, Scraggins’ argument is essentially a double jeopardy argument in that he is complaining it is unfair to punish him twice for the same conduct. (Appellant’s Brief, pp.11-12.) However, it is well-established in Idaho that a probationer is not entitled to credit for time served for discretionary jail time that is served as a condition of probation. State v. Dana, 137 Idaho 6, 43 P.3d 765 (2002); State v. Buys, 129 Idaho 122, 922

P.2d 419 (Ct. App. 1996). Indeed, this is true even if the discretionary jail time results in a period of incarceration that exceeds the statutory maximum. Dana, 137 Idaho at 8, 43 P.3d at 767. Scraggins cannot avoid binding precedent simply by restating the same essential argument as a violation of due process.

Further, Scraggins' characterization of discretionary jail time and probation revocation as "punishment" for a probation violation is not well-taken. "The purpose of probation is to give the defendant an opportunity to be rehabilitated under proper control and supervision." State v. Sandoval, 92 Idaho 853, 860, 452 P.2d 350, 357 (1969) (citing State v. Oyler, 92 Idaho 43, 436 P.2d 706 (1968)). Discretionary jail time is not "punishment"; it is a tool to motivate a defendant's compliance with the terms of probation while still affording him the opportunity to rehabilitate in the community. See Dana, 137 Idaho at 8, 43 P.3d at 767. Revocation also does not constitute "punishment" for a particular violation; rather, it is what occurs when the defendant's conduct demonstrates that probation is not achieving the goal of rehabilitation and is not consistent with the protection of society. State v. Drennen, 122 Idaho 1019, 842 P.2d 698 (Ct. App. 1992). The only "punishment" the defendant suffers when probation is revoked is that which was originally imposed for the crime of conviction. Scraggins' claim that imposition of discretionary jail time and subsequent revocation of probation based upon the same conduct is unconstitutional punishment fails.

Scraggins also argues that revocation of probation based upon conduct that also formed the basis of discretionary jail time violates the "implied" "promise

that the government will punish a violation either through intermediate sanctions or revocation, but not both.” (Appellant’s Brief, p.12 (emphasis original).) According to Scraggins, “without such a promise, the probationer would have minimal incentive to accept the intermediate sanction and continue on probation; in many cases, the probationer would be wise to simply withdraw from probation and begin serving his sentence.” (Appellant’s Brief, p.12.) In addition to the fact that Scraggins cites no authority for the proposition that the claimed implied promise actually exists, this argument suffers from at least two other flaws. First, while a defendant may elect to forego probation and its conditions and simply serve his sentence, the state is unaware of any authority that allows a probationer to accept or reject discretionary jail time and just “begin serving his sentence.” Second, Scraggins’ argument is inconsistent with the principle that “facts existing when the sentence was imposed as well as events occurring between the original sentencing and the revocation of probation” are all relevant to a revocation decision. State v. Hanington, 148 Idaho 26, 27, 218 P.3d 5, 7 (Ct. App. 2009). If Scraggins’ argument is taken to its logical conclusion, a court would never be able to consider anything other than the conduct that resulted in the probation violation allegations at issue at the time of revocation. This is not only inconsistent with the law, it is illogical and poor public policy, particularly in light of the purpose of probation.

Finally, Scraggins claims “other courts have provided some persuasive guidance” “dealing with situations such as the one that is present in this case.” (Appellant’s Brief, p.12.) Specifically, Scraggins cites Byrd v. Caswell, 34 P.3d

647 (Okla. Ct. Crim. App. 2001), Rogers v. State, 640 S.W.2d 248 (Tex Ct. Crim. App. 1982), and Wright v. State, 640 S.W.2d 265 (1982). (Appellant's Brief, pp.12-13.) These cases are not relevant to the issue "present in this case," much less persuasive.

At issue in Byrd was whether an Oklahoma statute that required the state to prove grounds for a probation revocation within 20 days of arraignment prevented the state from dismissing and refileing the allegations when it could not comply with the 20-day deadline. 34 P.3d at 648. The court held that the statute did prevent such action. Id. at 649. This conclusion in no way informs the due process inquiry in this case.

The question in Rogers was whether, for purposes of due process, there was a legitimate distinction between continuing disposition on proven probation violation allegations to allow the probationer to demonstrate he was still a good candidate for probation and actually disposing of the alleged violation by continuing the probationer on probation. 640 S.W.2d at 250. A panel of the Texas Court of Criminal Appeals held there was not and, as such, in order to revoke probation at the conclusion of a continued disposition, the probationer was entitled to notice and a hearing. 640 S.W.2d at 255. Following a second petition for rehearing, the court ultimately affirmed the order revoking probation because the due process claim previously decided by the court was not preserved, but stated it adhered to the following principle:

[W]e agree that the distinction between "continuing the probation" and "continuing the hearing" is irrelevant to the question of what process is due when the trial court finally takes away the probationer's liberty. Further, we agree with the majority on original

rehearing that due process mandates another determination that the probationer has breached the conditions of probation *after* he has been returned to probation (or that there is newly discovered evidence of a previous violation which was not known at the time of the first revocation hearing). And this new determination must occur at another revocation hearing for which the probationer has been served with a new motion to revoke giving him proper notice as required by due process.

Rogers, 640 S.W.2d at 263 (emphasis original).

The foregoing principle, however, has no bearing on the issue in this case because there is a fundamental difference between Scraggins and the probationer in Rogers – unlike Rogers, Scraggins' probation was not revoked “*after* he had been returned to probation.” Accordingly, due process did not require a “new motion to revoke giving him proper notice” or a hearing.

A panel of the Texas Court of Criminal Appeals addressed the same issue in Wright that was addressed in Rogers and held: “When a probationer is returned to probation, . . . probation may not be revoked without any determination of a new violation.” 640 S.W.2d at 270. As in Rogers, the trial court was ultimately affirmed on rehearing because the issue had not been preserved. Id. Nevertheless, Wright is not instructive to the issue in this case for the same reasons Rogers is not.

Because Scraggins has failed to establish his due process rights were implicated when the district court revoked his probation for the same conduct that served as the basis for his discretionary jail time, much less that any of his due process rights were violated, he has failed to show any error in the revocation of his probation.

CONCLUSION

The state respectfully requests this Court affirm the district court's orders revoking Scraggins' probation.

DATED this 26<sup>th</sup> day of October, 2011.

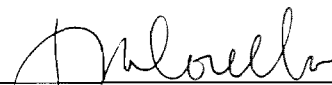
  
\_\_\_\_\_  
JESSICA M. LORELLO  
Deputy Attorney General

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I have this 26<sup>th</sup> day of October, 2011, served a true and correct copy of the attached BRIEF OF RESPONDENT by causing a copy addressed to:

ERIK LEHTINEN  
DEPUTY STATE APPELLATE PUBLIC DEFENDER

to be placed in The State Appellate Public Defender's basket located in the Idaho Supreme Court Clerk's office.

  
\_\_\_\_\_  
JESSICA M. LORELLO  
Deputy Attorney General

JML/pm



